Supreme Court, U.S.
FILED
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No. ——

In the Supreme Court of the United States

LILY SPENCER
Petitioner,

V.

WAL-MART STORES, INC.,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Civil Rights Act of 1991, can a district court properly characterize a jury award for past and future wages lost by a deaf employee during unpaid medical leave suffered as a result of exposure to an unlawful hostile work environment as "back pay" and, on the basis of that characterization, vacate the award as an "equitable" remedy precluded by her continued employment status?

PARTIES TO THE PROCEEDING AND STATEMENT UNDER RULE 29.6

The petitioner is Lily Spencer. The respondent is Wal-Mart Stores, Inc.

No publicly held company owns ten percent or more of Wal-Mart Stores, Inc.'s stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lily Spencer prays the Courts to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 7, 2007, in order to decide important questions of federal law which have not, but should be settled by this Court, to wit:

1. Under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, does a claim for wages lost during continuing unpaid medical leave caused by an unlawful hostile work environment require that the employee/victim be separated from employment; and

2. Is a claim for lost wages under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.*, and by reference under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e *et seq.* as amended by the Civil Rights Act of 1991, an "equitable" remedy properly decided by the court or a "legal" remedy to be resolved by the jury?

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition is published as *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311 (3d Cir. 2006). That Opinion is reprinted in Appendix C hereto ("App. C") at page C-1. By order filed February 7, 2007, the Third Circuit denied the petition for rehearing and rehearing en banc. App. D, at page D-1.

JURISDICTION

On March 11, 2005, the United States District Court for the District of Delaware issued a memorandum decision granting in part Wal-Mart Stores, Inc.'s ("Wal-Mart") Motion for a Judgment as a Matter of Law on the jury's award to Ms. Spencer of lost wages on her hostile work environment claim and deciding that the claim presented to the jury as "lost wages" (past and future losses characterized for the first time by the trial court as "back pay") should not have been presented to the jury and must be vacated because Ms. Spencer had not been affirmatively terminated or constructively discharged by her employer Wal Mart. Ms. Spencer filed a timely Motion for Relief from Judgment and a Motion to Alter and Amend Judgment which was granted in part and denied in part by the trial court on June 24, 2005. In its June 24, 2005 decision the trial court upheld its ruling that the back pay claim was improperly submitted to the jury because it was a claim for equitable as opposed to legal relief and could not be sustained by the court because Ms. Spencer remained employed. The lower court also ruled that because Ms. Spencer had been successful on her claims of emotional distress, she was entitled to recover on her claim for attorneys' fees. Ms. Spencer timely filed her notice of appeal on July 12, 2005.

On November 22, 2006, a three judge panel of the Third Circuit affirmed the decision of the district court. On February 7, 2007, the Third Circuit denied Ms. Spencer's timely filed motion for rehearing and rehearing en banc.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §12117(a) provides:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of ay provision of this chapter, or regulation promulgated under section 12116 of this title, concerning employment.

42 U.S.C. §2000e-5(g)(1) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against

shall operate to reduce the back pay otherwise allowable.

42 U.S.C. §1981a provides in pertinent part:

(a) Right of Recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2005e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C.A. 12117(a)), and section

794a(a)(1) of Title 29 respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice which is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 from the respondent.

* * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the

federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. §2000e-5(g)].

STATEMENT OF THE CASE

On or about January 21, 2003, Plaintiff, Lily Spencer ("Spencer") filed a Complaint alleging that defendant Wal-Mart Stores, Inc. ("Wal-Mart") violated the provisions of the ADA by, *inter alia*, failing to reasonably accommodate her disability (profound deafness) and subjecting her to a hostile work environment because of her disability. Ms. Spencer claimed that she was forced to take an extended unpaid medical leave that had continued through the time of trial and was anticipated by her therapist to continue for an additional six (6) months.

Prior to trial, Wal-Mart filed motions *in limine*, including one to preclude an award of wage losses Ms. Spencer suffered in the past and would suffer in the future. The Court denied that motion on September 29, 2004, holding that Ms. Spencer would be allowed to present evidence of "damages allegedly flowing from the claimed discriminatory conduct."

In its proposed jury instructions, Wal-Mart requested that the Court instruct the jury that, as a matter of law, it

could not award plaintiff any damages for lost income. The Court denied Wal-Mart's request, permitting Ms. Spencer to pursue lost wages as an element of damages as part of her claims. Consequently, the verdict sheet provided the jury with two options under that portion of the verdict sheet titled "Damages": (i) Lost wages and (ii) Emotional distress.

A trial was convened before the Honorable Kent A. Jordan, Judge of the District of Delaware and a jury on October 4, 2004 and on October 7, 2004 the jury rendered a verdict in Ms. Spencer's favor on her hostile work environment claim and awarded her $15,000 in lost wages and $12,000 for emotional distress. At trial, Ms. Spencer presented evidence that the hostile environment to which she was subjected was sufficiently severe that she became suicidal and was forced to take an unpaid leave of absence. At the time of trial Ms. Spencer was still employed by Wal-Mart but remained on an unpaid medical leave of absence. The jury's award for lost wages was based on the earnings Ms. Spencer was denied during the time she was forced to take the unpaid leave of absence, including the six months future loss of wages estimated for her full recovery by her therapist who testified at the trial.

After the verdict, Wal-Mart filed a Motion for Judgment as a Matter of Law asserting that Spencer failed to prove that she was subjected to a hostile work environment and that, if she had been subjected to a hostile work environment, she was not entitled to damages for lost wages. Spencer also filed a post-trial Motion seeking to amend the judgment to include injunctive relief (in the form of an Order by the court requiring Wal-Mart to provide a workplace free of hostility toward deaf employees) and a Motion for Reimbursement of Attorneys' Fees and Costs.

On March 11, 2005, the district court vacated the $15,000 award for lost wages and denied Spencer's motions

for injunctive relief and attorneys' fees and costs in their entirety. [Appendix A, pp. A-1, *et seq.*]. Spencer filed a timely Notice of Appeal and a Motion to Alter or Amend Judgment and Motion for Relief From Judgment.

In an Opinion and Order dated June 24, 2005, the district court refused to reconsider its earlier ruling denying plaintiff's claim for lost wages (because Ms. Spencer neither had been terminated nor claimed that she had been constructively discharged), but held that she was a "prevailing party" under the applicable fee shifting provisions of the applicable statutes and awarded plaintiff a portion ($38,569.34) of the $154,277.34 in attorneys' fees and costs requested in Plaintiff's Motion for Reimbursement of Attorneys' Fees and Costs. [Appendix B, pp. B-1, *et seq.*]

Spencer filed a timely Notice of Appeal from the June 24, 2005 Decision and Order. On November 22, 2006, the Court of Appeals for the Third Circuit affirmed the trial court's Orders, specifically characterizing the award of lost wages as "back pay" and, as such, stating it was equitable relief that was properly denied by the district court within its discretion and holding "that a successful hostile work environment claim alone, without a successful constructive discharge claim is insufficient to support a back pay award." [Appendix C at p. C-11 – C-12].

Spencer filed a timely Petition for Rehearing and for Rehearing *En Banc*, which was denied without opinion by Order dated February 7, 2007.

REASONS FOR GRANTING THE PETITION

A. This Matter Presents Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court

This matter presents two important questions of statutory interpretation that have not been previously addressed directly since the enactment of the 1991 amendments to the Civil Rights Act of 1964 which, *inter alia*, granted all victims of unlawful discrimination the right to a jury trial:

The first question is posited on whether wage losses occasioned, as here, while the claimant is still employed are a legal or equitable remedy. Prior to the 1991 amendments, all claims under Title VII, and by extension, the ADA, were tried before a judge without a jury, making the issue of whether lost wages are an equitable remedy or a legal remedy moot. Now that all litigants under both of those statutes are entitled to a jury trial, it is respectfully suggested that this Court must provide guidance to the lower courts as to whether lost wages are a "legal" remedy which can be awarded in conjunction with any equitable relief granted by the court, or is an "equitable" remedy within the discretion of the court.

The second question requires that this court provide guidance to the lower courts as to whether a claim for an ongoing loss of wages consequential to a hostile work environment requires that the employee victim be separated from the underlying employment to be actionable. More specifically, Ms. Spencer requests that the Court clarify the distinction between "back pay" (the loss of employee compensation suffered *after* termination of employment) and "wage loss" (the diminution of employee compensation while still employed) as well as whether an employer such as Wal-

Mart that unlawfully causes a loss of wages to an employee can avoid liability for the damages suffered by that employee by simply not discharging that individual from employment.

B. Back Pay: Legal or Equitable Remedy?

1. Interpretation In The Lower Courts

This petition presents the issue of whether back pay or lost wages as a remedy for discrimination under Title VII, as incorporated in the ADA is an equitable remedy to be awarded in the discretion of the court, or a legal remedy to be awarded by the jury.[1] The lower courts dealing with this issue have nearly uniformly accepted, without extensive comment or explanatory reasoning, the view that it is an equitable remedy within the trial court's discretion. They have based this holding on a strained interpretation of the language of Section 5(g)(1) of Title VII:

> The court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate.

42 U.S.C. §2000e-5(g)(1).

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[1] The lower courts have uniformly blurred the distinction briefly discussed above between "back pay" claims resulting from the termination of employment and lost wage claims where the employment continues. In the present matter, that loss of distinction has resulted in the illogical and improper conclusion reached by the courts below that Ms. Spencer was required to have been terminated in order to be eligible to make a claim for wages lost in the past.

More specifically, the equitable remedy viewpoint has been reached by improperly interpreting the clause "or any other equitable relief" as modifying the segregated clause regarding the discretionary award of back pay and further basing this interpretation on the fact that the remedial language in Title VII mirrors that in the National Labor Relations Act ("NLRA"). *See e.g. Germankin v. Constanzo*, 626 F.2d 1115, 1119, 1123 (3d Cir. 1980); *Lutz v. Glendale Union High School*, 403 F.3d 1061, 1069 (9th Cir. 2005); *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659 (7th Cir. 2001).

Recently, however, this Court has questioned that interpretation, noting that it was equally reasonable to conclude that the clause "any other equitable relief" references the permitted actions of reinstatement or hiring (clearly equitable remedies) and not "back pay" which, as a monetary award, has been traditionally considered a legal remedy. *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204, 218 n. 4 (2002).

Petitioner respectfully suggests that the "equitable remedy" interpretation and the failure to consider a claim for past lost wages or back pay as a call for a legal remedy requiring a determination by the jury is improper and not supported by the legislative history of Title VII. The impropriety of this interpretation is brought into particular focus by the unique facts of this case in which the employee was forced by the employer's discriminatory actions to take an unpaid medical leave of absence and, at the time of trial, was still employed by the employer, so that reinstatement was not required, but damages for the pay the plaintiff lost during her unpaid leave of absence should have been awarded.

2. The Legislative History Of Section 5(g)(1) of Title VII

Consideration of Title VII began in 1962, spearheaded by the administration's commitment to the passage of a civil rights law and a sense that the political climate required action. After President Kennedy's assassination, many legislators viewed passage of an employment rights bill as an urgent matter, leading to a departure from the usual system of careful committee deliberation. In fact, critical portions of the final law were forged on the floor of the Senate rather than in committee. This truncated process particularly affected the consideration of the enforcement and remedy provisions of the Act. It is crucial, therefore, to review the debates reported in the Congressional Record to divine the intent behind the final provision of Title VII.

The full House was presented with two distinct models of enforcement. The first, proposed by the House Committee on Education and Labor, envisioned an Equal Employment Opportunity Commission ("EEOC") which would resemble the National Labor Relations Board ("NLRB"), giving the EEOC the judicial powers to hold evidentiary hearings and issue cease and desist orders and to grant awards for losses of income suffered by victims of discrimination. This scheme contemplated only limited review by the federal courts. H.R. Rep. No. 405, 88th Cong., 1st Sess. (1963). An alternative model was created by the House Judicial Committee, which viewed the EEOC as an agency primarily responsible for conciliation and settlement of discrimination claims and, if no agreement could be reached, victims of discrimination in the workplace would be permitted to seek injunctive as well as monetary relief for lost earnings in the federal courts. H.R. Rep. No. 405, *supra.*, note 2 at 2405.

The full house adopted the Judiciary Committee's enforcement scheme. The bill then went directly to the Senate floor without further committee consideration. During the ensuing debate, the statute went through extensive changes, including the so-called Mansfield-Dirksen substitute which eliminated the EEOC's authority to bring a civil action and transferred that power to individual complainants after exhaustion of the conciliation process. The final Senate version also permitted the Attorney General to bring a federal action in the case of a pattern or practice of discrimination and it allowed for an award of attorney's fees to prevailing parties in court proceedings. 110 Cong. Rec. 2804-05 at 14,331-32 (1964). The House adopted this version of Title VII without conference or debate, 110 Cong. Rec. 15,897 (1964), and the President signed it into law the same day.

While the language of Section 5(g)(1) may have been copied from the NLRA, Congress recognized that the purposes of the statutes varied considerably. The primary intent of the NLRA was to preserve industrial peace and to eliminate labor disruption that interfered with commerce. 29 U.S.C. §151. For that reason the power to award lost earnings was placed firmly with the NLRB, subject to virtually no interference from the courts. *NLRB v. J.H. Rutter-Rex Manufacturing Co.*, 369 U.S. 258, 263-64 (1969), citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953). In contrast, there was no equivalent language placed into Title VII demonstrating any Congressional recognition of a need to protect employers from the disruption caused by union organizing in the discrimination context. Instead, Title VII is motivated by a unitary concern for the protection of individual in the workplace. For that reason, Congress transformed the enforcement scheme into an essentially private model directed by individual litigants, intentionally transferring the power to effectuate the statute from an agency to the judiciary. For that reason, reliance on analogies to the limitations on monetary relief in the labor

law context is unpersuasive as an indicator of Congressional intent.

In the years following the passage of Title VII, the inadequacies of its enforcement mechanisms became apparent. In 1972 Congress amended Title VII primarily to strengthen the powers of the EEOC. In doing so, however, Congress again failed to look at the necessary relationship between enforcement and remedy. While the 1972 Amendments to Title VII appended to the list of permissible relief the catch-all phrase, "any other equitable relief," the addition of these words was never the subject of debate, nor did these words appear in the bills that were the subject of committee reports. Instead, the words were added by amendment on the Senate floor in order to give courts "wide discretion" to fashion "the most complete relief possible." S. Rep. No. 415, 92nd Cong., 1st Sess. 8, 118 Cong. Rec. 7166, 7168 (1972). In fact, the section-by-section analysis of the 1972 amendments approve the view of courts that have interpreted Title VII as not only requiring the elimination of discriminatory practices, but also mandating that victims be "made whole" and "restored to a position where they would have been" but for the unlawful acts. 118 Cong. Rec. *Id.*

Contrary to this restrictive purpose, one of the unfortunate but quite apparent effects of the amendments was to solidify the majority judicial interpretation of the Title VII remedial scheme that back pay was intended as an equitable rather than a legal remedy. However, had the court looked in detail to the statute's history, they might well have reached a contrary conclusion. At the very least, it appears evident that the statutory reference to back pay came about more through a considered unthinking incorporation of an alternative enforcement mechanism than through a considered judgment of what relief actually would be necessary to make victims whole.

3. Lost Earnings Are Not A Form Of Equitable Restitution But Rather Legal Relief Addressable To A Jury

Traditionally, the concept of restitution turns on the status of the defendant, not on that of the plaintiff. The defendant "restores" to the plaintiff either the property wrongfully taken or the money gained as a result of the taking, *i.e.* his unjust enrichment. Equity deprives the defendant of money to which he is not entitled in good conscience. Restatement of Restitution §§ 128, 150, 159, 202 (1937).

Damages, on the other hand, compensate a claimant for his losses, which may or may not equal the defendant's gain. Lost earnings, in the employment discrimination context, simply does not represent a measurement of an employer's gain or the profit it accumulated as a result of the discriminatory act, but rather is viewed as a marker of the employee's monetary loss. In contrast to traditional concepts of restitution, the concept of "restoration" under Title VII, hinges on the employee's injury and involves restoring the injured party to the monetary position he or she would have been in had it not been for the discriminatory act. For that reason, lost earnings (and "back pay" as cited in Title VII) stand in closer proximity to "legal" than to "equitable" relief.

In *Great-West Life & Annuity Insurance Company v. Knudson*, *supra*, this Court specifically questioned whether the language in Section 5(g)(1) does, in fact, characterize back pay as an equitable rather than a legal remedy:

> Congress "treated [backpay] as equitable" in Title VII, *post,* at 7 (opinion of Ginsburg, J), only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief:

> "The court . . . order such affirmative action as may be appropriate, which may include but is *not limited to, reinstatement or hiring of employees, with or without back pay* . . ., or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g)(1) (emphasis added).
>
> If the referent of "other equitable relief" were "back pay," it could be said, in a sense relevant here, that Congress "treated" backpay as an equitable relief. In fact, however, the referent is "reinstatement or hiring of employees," which is modified by the phrase "with or without back pay."

534 U.S. at 218, n. 4 (emphasis in text).

While this discussion of the possible legal, rather than equitable, nature of back pay was not the holding of the Court and is clearly dicta, it evidences this Court's apparent recognition that the award of damages for lost earnings or back pay is a legal remedy and clearly invited the conducting of a future analysis of whether lost earnings as a remedy for a violation of Title VII was in fact intended as an equitable remedy or a legal remedy.

The facts of the present case underscore the importance of this Court's consideration of the nature of back pay as a remedy under Title VII. The jury specifically found that Ms. Spencer was subjected to a hostile work environment on the basis of her disability (deafness). At the time of trial, the hostile work environment to which Ms. Spencer was subjected caused her emotional distress to such a great degree that she had suicidal ideations. As a result, her mental health provider insisted that she take a leave of

absence from work. That leave, which was unpaid, continued through the time of trial and it was estimated that it would continue for another six (6) months. When the jury returned its verdict, which included damages only for the pay Ms. Spencer lost because she was forced by Wal-Mart's failure to remedy the hostile work environment to which she was subjected, Ms. Spencer was still employed by Wal-Mart.[2] For that reason, reinstatement was not required nor requested by Ms. Spencer.

The trial court incorrectly ruled that the $15,000 for lost wages awarded by the jury was an equitable remedy within the discretion of the court rather than the jury. It also found that, because Ms. Spencer had not claimed that she had been constructively discharged, she was not entitled to back pay, ignoring the fact that Ms. Spencer could not allege constructive discharge as she was still employed by Wal-Mart at the time of trial. The Court of Appeals for the Third Circuit, without undertaking an independent analysis of this issue, adopted the trial court's reasoning and affirmed the trial court's disallowance of the award for lost wages made by the jury.

C. Claims for Lost Wages During Continued Employment

The decision of the trial court as affirmed by the Third Circuit brings into sharp focus the inherent injustice in the traditional characterization of past lost wages as an equitable rather than a legal remedy. While it is acknowledged that the purpose of the remedial section of Title VII is to make victims of discrimination whole

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[2] The relatively small award rendered by the jury for "Lost Wages" is reflective of the fact that, at the time she was forced to take medical leave, Ms. Spencer was earning only $8.09 per hour.

[*Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)], the Third Circuit's decision affirming the vacating of the jury's award of lost wages to Ms. Spencer effectively will serve to deny any remedy to an employee/victim who suffers any loss of earnings because of the employer's unlawful discrimination, but remains employed by that employer. This result clearly contradicts the specified intent of Title VII to make victims of discrimination whole.

In *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) this court noted that the 1991 Civil Rights Act expanded the remedies under Title VII to allow monetary relief for some forms of workplace discrimination that would not previously have justified *any* relief under Title VII:

> As this case illustrates even if unlawful discrimination was proved, under prior law a Title VII plaintiff could not recover monetary relief unless the discrimination was also found to have some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation or termination. See *[U.S. v.] Burke*, 504 U.S. 299 at 240 (1992). ("The circumscribed remedies available under Title VII [before the 1991 Act] stand in marked contrast not only to those available under traditional tort law, but under other federal anti-discrimination statutes, as well"). Section 102, however, allows a plaintiff to recover in circumstances in which there has been unlawful discrimination in the "terms, conditions, or privileges of employment," 42 U.S.C. §2000e-2(a)(1), even though the discrimination did not involve a discharge or a loss of pay. In short, to further Title VII's "central statutory purposes of eradicating discrimination

> throughout the economy and making persons whole for injuries suffered through past discrimination," *Albermarle Paper Co.*, 422 U.S. at 421, §102 of the 1991 Act effects a major expansion in the relief available to victims of employment discrimination.

Landgraf, 511 U.S. at 254-256.

It is axiomatic that the purpose of Title VII and the ADA is to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albermarle Paper*, 422 U.S. at 418. Specifically, victims of discrimination are entitled to relief sufficient to restore them "to a position where they would have been were it not for the unlawful discrimination." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976). It is also acknowledged that, because the underlying purpose of Title VII and the ADA is to make the victim whole and to deter further discrimination, a finding of a violation of those acts presumptively entitles the victim to damages for wages lost because of the discrimination and that damages for such lost wages "should only be denied for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for the injuries suffered through past discrimination." *Abermarle Paper*, 422 U.S. at 421.

In the present matter, Ms. Spencer produced undisputed evidence that she lost pay because the hostile environment to which she was subjected was so severe that she was forced to take an unpaid medical leave of absence. It was also uncontested that, at the time of trial, Ms. Spencer

was still an employee of Wal-Mart, although she was still on an unpaid medical leave.[3]

By adopting a rule that a victim of a hostile work environment must also prove a constructive discharge to recover wages she lost as a direct result of the employer's failure to remedy that hostile work environment, the courts below foreclosed Ms. Spencer, admittedly a victim of invidious discrimination who remained employed by the offending employer but lost pay during the term of an unpaid medical leave she was forced to take as a result of the hostility, from receiving *any* remedy for the employer's intentional discrimination. Such a result is directly contrary to the aforecited decisions of this Court which recognize that the purpose of the remedial provisions of the anti-discrimination statues is to make victims of discrimination whole for the injuries suffered through past discrimination.

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[3] While in most circumstances, a plaintiff may not recover damages for times during which she cannot work because she is disabled, that prohibition does not apply if the defendant's unlawful actions are the cause of the disability. *Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1101 (3d Cir. 1101) (citing *Mason v. Association for Independent Growth*, 817 F.Supp. 550, 554 (E.D.Pa. 1993); *Pierce v. SEPTA*, 2003 U.S. Dist. Lexis 3021 (E.D.Pa. February 13, 2003).

CONCLUSION

The issue of whether back pay is a legal remedy or equitable remedy has come into sharp focus after the 1991 amendments to Title VII of the Civil Rights Act of 1964, granting litigants the right to a jury trial, were enacted. Prior to those amendments, all issues regarding claims under Title VII, and by incorporation, the ADA, were necessarily decided by the judge. The legislative history of Title VII and of the 1972 amendments to that Act show that Congress gave little or no thought to the remedial portions of the statute, lending little credence to the contention that Congress intended back pay to be an equitable as opposed to a legal remedy. The fallacy of that analysis is further elucidated by the fact that back pay is not "equitable restitution" in the traditional sense as it does not represent the disgorgement of what the defendant gained by his wrongful conduct, but rather represents the measure of the plaintiff's loss. This is a distinction recognized by this Court in its 2002 decision in *Great-West Life & Annuity Insurance Company v. Knudson*, *supra*.

In the context of the present litigation, Ms. Spencer's claims for wages lost while she remained on medical leave were properly submitted to the jury as a legal remedy to which she demonstrated entitlement. The courts below improperly held that her requested relief for lost wages was equitable in nature and was properly removed from the province of the jury's fact finding responsibility. Further, the courts below completely misapplied legal principles applicable in termination cases to claims for "back pay" lost as a result of the final termination of employment to the jury's proper award of $15,000 to an employee who continued to be employed and continued to suffer the vestiges of unlawful conduct by her employer.

Accordingly, it is respectfully suggested that the important issues raised by the universally applicable constraints placed on Ms. Spencer's recovery demand review by this Court, thereby permitting essential guidance in the context of the many cases that are brought under federal and state discrimination laws each year.

Respectfully submitted,

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May 8 2007

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LILY SPENCER,	)	
Plaintiff,	)	
v.	)	Civil Action No.
WAL-MART STORES, INC.,	)	03-104-KAJ
Defendant.	)	

ORDER

For the reasons set forth in the Memorandum Opinion issued in this action on this date, the motion filed by Defendant Wal-Mart Stores, Inc. for judgment as a matter of law (D.I. 80; the "JMOL Motion") is GRANTED to the extent that the $15,000 award to Plaintiff for lost wages is vacated; in all other respects the JMOL Motion is DENIED. Plaintiff Lily Spencer's motion for amendment of judgment to include injunctive relief (D.I. 76) is DENIED, and Plaintiffs further motion for reimbursement of attorney fees (D.I. 78) is DENIED.

March 11, 2005 Wilmington, Delaware

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LILY SPENCER,	)	
Plaintiff,	)	
v.	)	Civil Action No.
WAL-MART STORES, INC.,	)	03-104-KAJ
Defendant.	)	

MEMORANDUM OPINION

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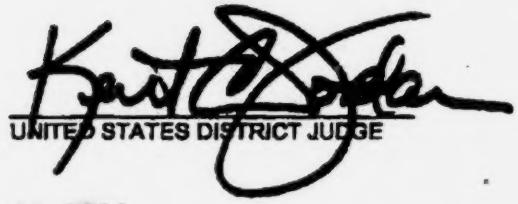

March 11, 2005
Wilmington, Delaware

I. INTRODUCTION

From October 4 to October 7, 2004, this disability discrimination case was tried to a jury, resulting in a verdict of $27,000 for Lily Spencer ("Plaintiff") and against Wal-Mart Stores, Inc. ("Wal-Mart"), that sum consisting of the jury's award of $12,000 for emotional distress and $15,000 for lost wages. (Docket Item ["D.I."] 68.) Plaintiff claimed that she was subjected to a hostile work environment at Wal-Mart and that Wal-Mart failed to reasonably accommodate her disability, in violation of the Americans with Disabilities Act. (D.I. 1.) Currently before me is a post-trial motion for judgment as a matter of law ("JMOL") (D.I. 80) filed by Wal-Mart for a finding that Plaintiff failed to prove that she was subjected to a hostile work environment and that, even if she had been subjected to a hostile work environment, she is not entitled to lost wages. Also before me Is Plaintiffs motion to amend the judgment to include injunctive relief to prevent Wal-Mart from further engaging in discriminatory practices (D.I. 76) and a motion for reimbursement of attorney's fees and costs (D.I. 78). For the reasons stated herein, the JMOL motion will be granted in part and denied In part and Plaintiffs motions will be denied.

II. PROCEDURAL BACKGROUND

On August 26, 2004, Wal-Mart and Plaintiff filed a proposed joint pre-trial order, in which Wal-Mart made a motion in limine to preclude Plaintiff from seeking an award of

front and back pay. (D.I. 47 at 24-26.) In a September 29, 2004 Order, I denied that motion. (D.I. 58.) Later, at the jury instruction conference during the trial, Wal-Mart again voiced its objection to the inclusion of a space for an award of back pay on the verdict sheet to be used by the jury. (D.I. 74 at 116-20.) I again overruled their objection and allowed both sides to make their respective arguments to the jury. (*Id.*) The jury verdict form provided for possible findings as to both lost wages and emotional distress. (D.I.68.)

In a prior settlement of Plaintiffs worker's compensation claim against Wal-Mart, the parties agreed that at least $12,000 of that settlement would be credited against any recovery in this litigation. *See infra*, Section V. pg. 8-10.

III. MOTION FOR JUDGMENT AS A MATTER OF LAW

A. Standard of Review

To prevail on a renewed motion for JMOL following a jury trial[1], a party must show that "the record is critically

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[1] Rule 50(a) of the Federal Rules of Civil Procedure empowers a court during trial to rule against a party as a matter of law after the moving party is fully heard on an issue, If "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993) (citation omitted). If the court denies a motion for JMOL during trial, a party may renew the motion within ten days of entry of judgment in the case. Fed. R. Civ. P. 50(b). Wal-Mart properly preserved its right to make the present motion.

deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993). "The Court is not free to weigh the evidence, pass on the credibility of witnesses, or substitute its own judgment of the facts for that of the jury." *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, No. 81-471, 1983 U.S. Dist. LEXIS 14075 at *9 (D. Del. 1983).

B. Discussion

i. Lost Wages

Wal-Mart argues that it was improper to allow the jury to include "lost wages" In its calculation of compensatory damages. (D.I. 81 at 8-9.) The term "lost wages" as used in this case has the same meaning as the term "backpay" used generally in employment discrimination cases. *See Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108, 1119 (3d Cir. 1988) (stating that "[t]he appropriate standard for the measurement of a back pay award is to take the difference between the actual wages earned and the wages the Individual would have earned in the position that, but for discrimination, the individual would have attained").

Historically in Title VII cases, compensatory, damages were not permitted. Rather, all relief was governed by 42 USCS § 2000e-5(g), which states:

> [i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice

> charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but Is not limited to, reinstatement or hiring of employees, with or without back pay ... .

42 U.S.C. § 2000e-5(g). After the enactment of the Civil Rights Act of 1991, however, compensatory damages were also allowed in cases involving intentional employment discrimination. 42 U.S.C. § 1981.a(a)(2). Nevertheless, Section 1981a states that "[c]ompensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]." 42 U.S.C. § 1981a(b)(2).

Although back pay is not allowed as compensatory damages, it is still available through 42 U.S.C. § 2000e-5(g)(1). *See Booker v. Taylor Milk Co.*, 64 F.3d 860, 864 (3d Cir. 1995) (stating that "VII authorizes, *inter alia*, a back pay award"). Moreover, as stated in Section 2000e, the determination of back pay is for the court and, therefore, equitable in nature. *See Bates v. Board of Educ.*, C.A. No. 97-394-SLR, 2000 U.S. Dist. LEXIS 4873, 24-25 (D. Del. 2000) (stating that "back pay is intended as an equitable remedy").

As already noted (*supra* at 1-2), during consideration of the in limine motions, Wal-Mart argued that I should not

permit Plaintiff to seek lost wages. (D.I. 47 at 24-26.) It argued that because Plaintiff had not made out a case for constructive discharge, she should not be permitted to collect lost wages that accrued after what Wal-Mart characterized as a voluntary termination of her employment. (Id.) In my order denying that motion (D.I. 58), I concluded that "[w]hether damages are appropriate in this case is ... a matter to be determined at trial."[2] (Id. at 2-3.) Wal-Mart raised the subject briefly again during the jury instruction conference, and its objection to the inclusion of lost wages on the verdict sheet was noted. (D.I. 74 at 116-20.)

With the lost wages/back pay issue now before me once more, I conclude that the issue was not one properly put to the jury and is solely within the province of the court. *See Bates v. Board of Educ.*, C.A. No. 97-394-SLR 2000 U.S. Dist. LEXIS 4873, 24, 25 (D. Del. 2000). Accordingly, as the issue of back pay should not have been submitted to the jury, I must grant Wal-Mart's JMOL motion to vacate the jury verdict of $15,000 in lost profits.

Plaintiff has not requested that I grant equitable relief in the form back pay. Even if she had, however, I would not find it appropriate in this case, as she has not alleged constructive discharge. In fact, her attorney specifically disclaimed any

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[2] Because neither party addressed the equitable nature of back pay in their briefing, I did not address it in that Memorandum Order.

constructive discharge claim during the jury instruction conference, and there was no evidence or argument about constructive discharge given at trial. (D.I. 65 at 117 (stating that "[s]he is out on medical leave ... [those sums] the amount of money that she lost ... are compensable damages that don't amount to constructive discharge").) Therefore, any post-trial attempt by Plaintiff to make out a case for constructive discharge would be unpersuasive. Back pay is thus not a remedy available to Plaintiff. *See Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659 (7th Cir. 2001) (holding that "[a] victim of discrimination that leaves his or her employment as a result of the discrimination must show either an actual or constructive discharge in order to receive the equitable remedy of reinstatement, or back and front pay in lieu of reinstatement").

ii. Hostile Work Environment

Wal-Mart argues that the evidence presented at trial did not demonstrate harassment based on Plaintiffs disability and, even if there had been such harassment, there was insufficient evidence to show that the harassment was so severe or pervasive as to render the store a hostile work environment. (D.I. 81 at 3-7.) Wal-Mart does, however, list six incidents that Plaintiff relied on at trial to show the existence of a hostile work environment, and Plaintiff cited numerous others from the record. (*Id.* at 4; D.I. 84 at 4-9.) Although Wal-Mart argues that these Incidents were not motivated by or the result of

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Plaintiffs disability, the testimony of Plaintiff, along with the testimony of her son, was enough for a jury to conclude that many, if not all, of the harassing behavior was directed at Plaintiff because of her deafness. (D.I. 84, Ex. 1 at 150-53, 157-58, 163, 167.)

Plaintiff testified that Wal-Mart created a hostile work environment through the lack of properly trained interpreters and that her supervisor, Mr. Tran, was hostile towards her whenever qualified interpreters were requested. (*Id.* at 144-49, 153, 159, 157-58.) On one occasion, Mr. Tran yelled at Plaintiff for requesting an interpreter and threw a book on the table, which greatly upset Plaintiff. (*Id.* at 153.) Mr. Tran and other employees refused to write notes to aid in communication with Plaintiff. (*Id.*) Plaintiff was also more closely supervised than other employees, her supervisor going so far as to follow her to the rest room, for example. (*See Id.* at 157-58.) Her son also testified that her boss called her stupid and ignored her complaints about the poor treatment that she was receiving at Wal-Mart. (*Id.*, Ex. 2 at 203.)

Additionally, Plaintiff testified that, while working in the cash office at Wal-Mart, she was met with hostility when she asked simple questions or tried to teach other employees simple signs to help them communicate with her. (*Id.* at B-160-62.) As an example, Plaintiff testified that one Wal-Mart employee tapped her on the shoulder, held up her middle

finger, and asked what it meant. (*Id.* at B-163.) Plaintiff said that, after ignoring the obscene gesture, the same employee again proceeded to tap her on the shoulder and hold up her middle finger. (*Id.*) Timothy Miller, a hearing-impaired co-worker of Plaintiffs, testified that a hearing co-worker, "was very mean and not friendly", to Plaintiff, and that he felt that the coworker in question 'was [either] an evil woman, or hated deaf people." (*Id.*, Ex. 3. at C56.) Mr. Miller testified that certain hearing employees treated Plaintiff and other deaf employees differently and that those hearing employees were not social towards or friendly with the deaf employees. (*Id.* at C-52.) He also testified that another manager, constantly watched Plaintiff and made her feel uncomfortable, and that the manager did not treat hearing employees in the same manner. (*Id.* at C-57.) Further, when Plaintiff was assigned to a specific department, she was never given an assistant; however, when "the new hearing person took over that department, he, that person had an assistant." (*Id.* at C-58.) Another hearing-impaired witness, Christy Hennessey, testified that, while visiting Plaintiff, a hearing employee signed or gestured a "dirty word" to her. (*Id.*, Ex. 4 at C-74.) The jury could fairly have considered all this as lending credibility to Plaintiff's contention that employees at Wal-Mart were routinely hostile towards her because of her disability.

Given the evidence presented, considered in the light

most favorable to Plaintiff, I cannot say that the jury erred in finding the actions of Wal-Mart and its employees created a hostile work environment.

IV. MOTION TO AMEND JUDGMENT TO INCLUDE INJUNCTIVE RELIEF

Plaintiff has also filed a motion pursuant to Federal Rule of Civil Procedure 59, asking the Court to alter or amend the jury's judgment to include Injunctive relief. (D.I. 76.) Plaintiffs motion is not well founded and fails to meet the "high standard" required for motions under Rule 59. *See Price v. Delaware Department of Correction*, 40 F. Supp.2d 544, 550 (D.Del. 1999). The evidence at trial did not show a pattern of discrimination by Wal-Mart that would require a permanent injunction, and there was also evidence that Wal-Mart had specific ADA policies designed and utilized to prevent any future discrimination. (*See, e.g.*, D.I. 73 at A-91, 98-100, 105, 107-110, 116-20; D.I. 70 at B-10, 15, 23-27, 142-43, 210-11.) Most significantly, injunctive relief is inappropriate in this context because Plaintiff is no longer an employee at Wal-Mart. Consequently and any Injunctive relief would not benefit her. See *Fesel v. Masonic Home*, 447 F. Supp. 1346, 1354 (D. Del. 1978) (holding "general Injunctive relief will not be granted where there will be no benefit to the plaintiff').

V. MOTION FOR REIMBURSEMENT OF ATTORNEY'S FEES

Title VII provides, In relevant part: "[i]n any action or proceeding under this title, the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee ... as part of the costs... ." 42 U.S.C. § 2000e-5(k). The United States Court of Appeals for the Third Circuit has established a test to determine whether a party qualifies for an award of attorney's fees:

> First, the plaintiff must be a "prevailing party"; i.e., the plaintiff must essentially succeed in obtaining the relief sought on the merits. Second, the circumstances under which the plaintiff obtained the relief sought must be causally linked to the prosecution of the Title VII complaint, in the sense that the Title VII proceedings constituted a material contributing factor in bringing about the events that resulted in the obtaining of the desired relief.

Blackshear v. City of Wilmington, 15 F. Supp. 2d 417, 432(D. Del. 1998) (quoting *Sullivan v. Commonwealth of Pennsylvania Dept. of Labor and Indus.*, 663 F.2d 443, 452 (3d Cir. 1981)). Further, "[a] prevailing party is entitled to recover its reasonable attorney's fees unless special circumstances would render such an award unjust.' *Tomes v. Metropolitan Life Ins. Co.*, 189 F.3d 331, 332 (3d Cir. 1999) (citing 42 U.S.C. § 2000e-5(k) (West Supp. 1999)); *Independent Fed'n of Flight*

Attendants v. Zipes, 491 U.S. 754, 761 (1989); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). The Supreme Court has held that "[a] plaintiff who seeks compensatory damages but receives no more than nominal damages" often represents one of the circumstances where attorney's fees are not appropriate. *Farrar v. Hobby*, 506 U.S. 103,115 (1992).

In the case at bar, Plaintiff was awarded $12,000 as compensatory damages for emotional distress and $15,000 as lost wages. (D.I. 68.) Because I have determined that she is not entitled to the $15,000 as lost wages, and because of the offset of the settlement of her worker's compensation claim against the remainder of the jury's award, Plaintiff will not recover any of the sums awarded by the jury.[3] Consequently, Plaintiff will recover no damages In this case. The question then becomes whether Plaintiff's lack of a recovery is akin to nominal damages deserving no award of attorney's fees, or, in the alternative, whether the jury's verdict represents an award

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[3] In Wal-Mart's Answering Brief, it notes that any recovery in this case must be offset by the earlier settlement of Plaintiffs worker's compensation claim. (D.I. 86 at 4, fn.2.) Wal-Mart further indicates the settlement was for approximately $12,000. (See *Id.*, (stating that offset of settlement against total jury award of $27,000 would leave "at most $15,000.").) Defendant did not attach the settlement, citing the confidentiality of the agreement as the reason. (*Id.*) Plaintiff has not refuted Wal-Mart's math, however, and I therefore take it at face value.

that, despite the Defendant's earlier worker's compensation settlement, is sufficient to support granting attorney's fees.

The Supreme Court has stated that damage awards are designed "to compensate Injuries caused" by the actions in question, but they were "never intended to produce windfalls to attorneys ...." *Farrar*, 506 U.S. at 115 (internal citations omitted). In this case, Plaintiff was already compensated by a settlement payment for harm she suffered at Wal-Mart. (D.I. 86 at 4, fn.2.) Plaintiff litigated this matter in the hopes that she could prove that she sustained damages in excess of the settlement payment, but she did not. Therefore, as a practical matter, this litigation did not benefit Plaintiff In any way, and an award of attorney's fees would be inappropriate. Consequently, Plaintiffs request for attorney's fees is denied.[4]

VI. CONCLUSION

For the reasons stated, I will GRANT Wal-Mart's motion for JMOL to the extent that I will vacate the award of lost wages, and I will DENY that motion in all other respects. (D.I. 80) I will also DENY Plaintiffs motions for amendment of the judgment (D.I. 76), and reimbursement of attorney fees (D.I. 78). An appropriate order will follow.

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[4] The awarding of attorney's fees with respect to settlements is permissible and may be necessary in some cases. Plaintiff has not, however, put forth any evidence that such an award would be appropriate in this case with respect to the settlement of the related worker's compensation case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LILY SPENCER,	)	
Plaintiff,	)	
v.	)	**Civil Action No.**
WAL-MART STORES, INC.,	)	**03-104-KAJ**
Defendant.	)	

MEMORANDUM ORDER

I. INTRODUCTION & BACKGROUND

Presently before me is a Motion to Alter or Amend Judgment and Motion for Relief from Judgment (Docket Item ["D.I."] 91; the "Motion") filed by Lily Spencer ("Plaintiff") pursuant to Federal Rule of Civil Procedure 59(e).[1] Plaintiffs' Motion, which is in essence a motion for reconsideration, comes in response to my March 11, 2005 Opinion, in which I ruled that Plaintiff was not entitled to lost wages and denied Plaintiff's Motion to Amend Judgment to Include Attorney's Fees. (D.I. 90.)

II. STANDARD OF REVIEW

A motion for reconsideration should be sparingly granted. The purpose of a motion for reconsideration is to correct

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[1] The factual background of the case is described in detail in *Spencer v. Wal-Mart Stores, Inc.*, C.A. No. 03-104-KAJ, 2005 U.S. Dist. LEXIS 4373 (D. Del. March 11, 2005).

manifest errors of law or fact or to present newly discovered evidence. *Seawright v. Carroll*, No. 02-1258-KAJ, 2004 WL 396310, at *1 (D.Del. Mar. 2, 2004) (citing *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985)). "A motion for reconsideration is not appropriate to reargue issues that the court has already considered and denied." Id. (internal citation omitted). A court may grant a motion for reconsideration "if the moving party shows: (1) an Intervening change in the controlling law; (2) the availability of new evidence that was not available when the court Issued its order; or (3) the need to correct a manifest injustice." *Id.* (citing *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)).

III. DISCUSSION

A. Lost Wages[2]

Plaintiff argues that, although equitable in nature, "the amount of back pay and front pay damages is left to the jury" and, therefore, I should have only "determined whether or not the jury's award was based on a reasonable method of calculation." (D. I. 92 at 3.) However, the case Plaintiff cites, *Bates v. Board of Educ.*, does not support her position. C.A. No. 97-394-SLR, 2000 U.S. Dist. LEAS 4873, *24-25, 31 (D. Del. March 31, 2000). That case shows that a jury can determine the amount of back pay and or front pay that should be awarded, but the decision

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[2] The terms "back pay" and "lost wages" are used interchangeably throughout this order.

makes clear that it is the province of the court to determine if back pay or front pay is appropriate. *Id.* at *24-25, 31. As to Plaintiffs argument that she is entitled to back pay as an equitable remedy, I have already ruled that she Is not, and nothing has changed in the interim to alter that decision. (D.I. 90.)

B. Attorney's Fees

In her Motion, Plaintiff argues that I based my denial of attorney's fees on the mistaken belief that the settlement of the state workers compensation claim occurred before the jury rendered a verdict in this case. (D.I. 92 at 5-6.) Specifically, Plaintiff argues that "[i]t was only after the jury awarded [her] damages for lost wages and emotional distress that she agreed to compromise her workers compensation claim ...." (Id. at 6.) Defendant does not dispute that the settlement was reached after the jury rendered its verdict, but instead argues that the timing is inconsequential because Plaintiff will still receive nothing as a result of this litigation. (D.I. 93 at 7.) As I was under a misimpression as to the timing of the settlement before issuing my last opinion, and because I think the timing is consequential, I will now reconsider my opinion in light of this newly presented evidence. (D.I. 90 at 8-10.)

The case law is clear that in order to be a prevailing party for purposes of the attorney's fees, a party must "succeed on any significant Issue in litigation which achieves some of the benefits the parties sought in bringing suit." *Hensley v.*

Eckerhart, 461 U.S. 424, 433 (1983) (internal quotations omitted). The Supreme Court has said "[t]his is a generous formulation that brings the plaintiff only across the statutory threshold." Id. In the instant case, at the time the jury verdict was rendered, Plaintiff received a monetary award for emotional distress, which is what she sought in bringing suit. (D.I. 72.) The subsequent agreement to offset the recovery In her workers compensation case does not alter her prevailing party status.[3] When the verdict was rendered, Plaintiff had not yet entered into the settlement of her workers compensation case. (D.I. 72; D.I. 92, Attach. A.) The timing matters here because it demonstrates that Plaintiff had her victory in hand and made knowledgeable decisions about how best to use that limited victory to her advantage. This is a significantly different circumstance than what I had understood previously, which was that Plaintiff had gone into the trial having already bargained away her potential recovery. But *cf. Gulfstream Ill Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 414, 423 (3d Or. 1993)

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[3] Plaintiff argues that because the state workers compensation claim cannot include claims for emotional distress, any settlement of her workers compensation claim cannot be used to offset her emotional distress award. (D.I. 92 at 6.) The settlement agreement has no such restrictions. (D.I. 93, Ex. B.) Consequently, I reaffirm the holding Implicit in my earlier decision (D.I. 89 at 9-10) that the settlement of the workers compensation claim can be used by Defendant to offset the damages award for emotional distress.

(holding that "the reduction of a plaintiffs net recovery due to the offset of a jury verdict by prior settlements does not indicate that plaintiff failed to prove any of its claims at trial"). She is indeed a statutory prevailing party.

Although the determination of whether a plaintiff is a prevailing party Is "generous," it only brings the plaintiff "across the statutory threshold[,] ... . It remains for the district court to determine what fee is 'reasonable.'" *Hensley*, 461 U.S. at 433. A reasonable fee is one that is adequate to attract competent counsel, but which does not produce a windfall for attorneys. *Pub. Interest Research Group of New Jersey, Inc. v. Windfall*, 51 F.3d 1179, 1185 (3d Cir. 1995) (internal quotations omitted); *Blum v. Stenson*, 465 U.S. 886, 897 (1984). The starting point for determining the reasonableness of a fee is to calculate the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. The result of this calculation Is called the "lodestar," the lodestar is presumed to be a reasonable fee. *See Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). There are, however, "other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" *Hensley*, 461 U.S. at 434. In fact, the degree of the success obtained is the most "critical factor" in the calculation of a "reasonable fee." *Id.* at 436. The most common scenario in which the "results obtained" has an effect on the

calculation of a "reasonable fee" occurs when a plaintiff succeeds on only some of the claims for relief. *See, e.g., Id.* (stating that, in such a situation, the questions that need to be answered are "did the plaintiff fall to prevail on claims that were unrelated to the claims on which he succeeded [and] did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award").

In the context of enhancing the lodestar to account for excellent results, the Supreme Court stated that "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee" and further said that the "'results obtained' from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as Independent bases for increasing the basic fee award." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986), The Third Circuit subsequently held that the lodestar may be adjusted to account for the "results obtained," but such an adjustment is done solely with relation to "wholly or partially unsuccessful claims that are related to the litigation of the successful claims." *Rode*, 892 F.2d at 1183 (citing *Hensley*, 461 U.S. at 434-37). Further, "[t]his adjustment should be taken independently of the other adjustments and should be the first adjustment applied to the lodestar." Id. (internal citation omitted). Generally, "where a plaintiff prevails on one or more claims but not on others,

fees shall not be awarded for time that would not have been spent had the unsuccessful claims not been pursued." *Lanni v. New Jersey*, 259 F.3d 146, 151 (3d Cir. 2001). If the claims were "were Inter-related, nonfrivolous, and raised in good faith," *Hensley*, 461 U.S. at 435, it still may be proper to reduce an award of attorney's fees to account for a plaintiffs failure to succeed on all claims. *Buss v. Quigg*, No. 02-4053, 91 Fed. Appx. 759, 761 (3d Cir. Feb. 5, 2004).[4]

The Third Circuit has stated that it is permissible to look at "the amount of damages awarded, ... compared with the amount of damages requested" when determining a reasonable fee.[5] *Washington v. Philadelphia County Court of Common Pleas* , 89 F.3d 1031, 1042 (3d Cir. 1996). In other words "the amount of damages awarded, when compared with the

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[4] Third Circuit Internal Operation Procedure 5.7 notes that the Court of Appeals, by tradition, does not cite non-precedential opinions; however, the citation of such opinions is not forbidden. *Cf.* Third Circuit Local Appellate Rule 28.3 ("[c]itations to federal decisions that have not been formally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision").

[5] It is not permissible, however, to consider what percentage of the damage award the lodestar comprises, however. *Washington*, 89 F.3d at 1041. Such a rule "would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts." Id. (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) (plurality opinion)).

amount of damages requested may be one measure of how successful [a] plaintiff was in his or her action." *General Instrument Corp. v. Nu-Tek Elecs. & Mfg.*, 197 F.3d 83, 91 (3d Cir. 1999) (citing *Washington*, 89 F.3d at 1041) (also holding, however, "that comparison may be an imperfect measure ..."}.[6]

The propriety of comparing the amount of damages awarded to the amount requested is supported by the Supreme Courts decision in *Farrar v. Hobby*, 506 U.S. 103 (1992). In that case, the Court held that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." 506 U.S. at 114. The logic of that statement supports the argument that more than "prevailing" is important in determining a "reasonable fee," that a qualitative assessment of the victory is also important, and that such an assessment may have a quantitative component.

In the case at bar, Plaintiffs counsel has submitted his hours worked and rates charged to come to a calculated

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[6] "Such an adjustment to the lodestar may conflict with the holding in *Rode*, i.e., that the adjustment for "results obtained" is done solely with respect to the comparison of successful and unsuccessful claims. See *Rode*, 892 F.2d at 1183. However, the Third Circuit may have contemplated that the adjustment to the lodestar to account for a plaintiff's limited monetary success would be done after the first independent adjustment for the "results obtained."

lodestar of $149,320 and expenses of $4,957.34 for a total of 154,277.34. (D.I. 79.) As a general matter I find these hours and rates reasonable, and chose not to reduce the hours or rates to reach a "reasonable fee." Instead I will determine if a general reduction of the lodestar is in order. See *Rode*, 892 F.2d at 1182 (stating that the court may account for limited success through the reduction of hours or a general reduction of the lodestar).

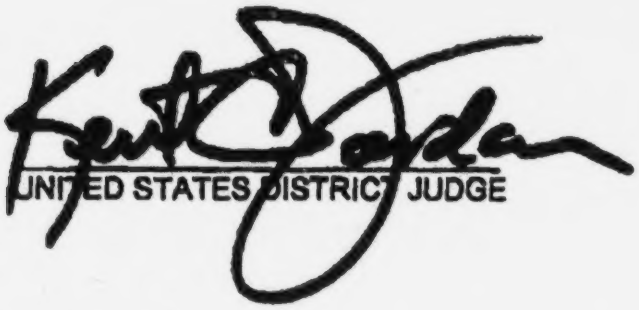
Because of my ruling with respect to Plaintiffs claim for back pay, *see supra*, Part III A, Plaintiff prevailed on only one of her claims, namely her claim of emotional distress. The presentation of evidence at trial and its development in discovery were such that the back pay and emotional distress aspects of the case are not subject to simple compartmentalization. As the time spent on Plaintiffs successful and unsuccessful claims cannot be parsed, I am not required to reduce the award of attorney's fees to account for unsuccessful claims. *Lanni*, 259 F.3d at 151.
Instead, the primary factor I look to in order to adjust the lodestar to arrive at a "reasonable fee" is the limited success of Plaintiff on the one claim as to which she prevailed, namely the $12,000 in damages awarded for Plaintiffs emotional distress. Plaintiff did not benefit in any tangible way from this litigation, other than the $12,000 award. In fact, as part of the settlement of her workers compensation claim, Plaintiff agreed to officially terminate her employment

with Defendant. Therefore, the only real benefit Plaintiff received from this litigation is the $12,000, which she later bargained away. While in some cases, an award of $12,000 may be considered a significant success, this is surely not one of those cases. Plaintiff indicated in the pretrial briefing that potential damages amounted to $500,000, not including compensatory and punitive damages. (D. I. 47 at 20-21.) Comparing the actual award of $12,000 to the projected damages of over $500,000 shows that this litigation was a serious disappointment for Plaintiff.

Plaintiff's counsel are highly experienced and deservedly enjoy excellent reputations. Counsel no doubt believed that Plaintiff had a strong case and that she would likely prevail on her claims, but they did not achieve the level of success they had anticipated. Nevertheless, in recognition of the limited success that was obtained, some limited award is appropriate. I have determined that a negative multiplier of 75% to the lodestar is appropriate to arrive at a "reasonable fee." This represents my effort to recognize the good faith efforts and skill brought to bear by Plaintiffs counsel and balance that against the minimal success achieved. Consequently, I hold that Plaintiff will be awarded $38,569.34 in fees and costs.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Motion (D.I. 91) is DENIED with respect to reconsideration of the March 11, 2005 Opinion as it pertains to Plaintiff's claim for lost wages, and the Motion is GRANTED with respect to reconsideration of the application for attorney's fees. IT IS FURTHER ORDERED that plaintiff is awarded, and Defendant shall pay, $38,569.34 in attorney's fees, inclusive of any costs.



June 24, 2005
Wilmington, Delaware

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-2143, 05-3436, 05-3471

LILY SPENCER,

Plaintiff-Appellant/Cross Appellee

V.

WAL-MART STORES,

INC., Defendant-Appellee/Cross Appellant

Appeal from the
United States District Court for the
District of Delaware
(D.C. No. 03-cv-00104)
District Judge: The Honorable Kent Jordan

Submitted Under Third Circuit LAR 34.1 (a)
September 29, 2006

Before: MCKEE and AMBRO, Circuit Judges, and
RESTANI*, Judge

(Filed: November 22, 2006)

States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

RESTANI, Judge.

This appeal arises from a discrimination action brought under the Americans with Disabilities Act ("ADA") by Lily Spencer ("Spencer") against her former employer, Wal-Mart Stores, Inc. ("Wal-Mart"). Spencer appeals the orders of the District Court vacating her back pay award and reducing her award of attorney's fees to reflect her limited success at trial. Wal-Mart cross-appeals, arguing that Spencer is not the prevailing party and thus is not entitled to any attorney's fees. We will affirm the orders of the District

Court.

I. Procedural and Factual Background

Spencer, who is hearing impaired, brought a discrimination action against Wal-Mart, alleging that it did not reasonably accommodate her disability and subjected her to a hostile work environment. The case proceeded to a jury trial on October 4, 2004. The jury rejected Spencer's first claim, finding that Wal-Mart had reasonably accommodated Spencer's disability. The jury, however, decided in favor of Spencer on her hostile work environment claim and awarded her $15,000 for lost wages, also known as back pay, and $12,000 for emotional distress. The jury did not award punitive damages to Spencer.

Afterward, Wal-Mart filed a motion for judgment as a matter of law ("JMOL"), arguing that Spencer failed to establish a claim of hostile work environment and that, even if she had established such a claim, she was still not entitled to back pay. Simultaneously, Spencer filed a motion to amend the judgment to include injunctive relief, as well as a motion for reimbursement of attorney's fees and costs.

The District Court granted Wal-Mart's motion for JMOL

in part and denied it in part. The Court upheld the jury finding as to a hostile work environment, but concluded that the back pay issue should not have been presented to the jury. Spencer v. Wal-Mart Stores, Inc., No. 03-104-KAJ, 2005 U.S. Dist. LEXIS 4373, at *7 (D. Del. Mar. 11, 2005). The Court found that this issue was "solely within the province of the court," because back pay is an equitable remedy. *Id.* The Court then declined to award back pay, noting that Spencer had not requested it from the Court. *Id.* The Court further stated that, even if Spencer had requested back pay, the Court would not have granted it because she did not allege constructive discharge. *Id.* As a result, the District Court vacated the jury's back pay award of $15,000. Id.

The District Court also denied Spencer's request for injunctive relief and for reimbursement of attorney's fees. *Id.* at *11, * 15. Specifically, the Court found that injunctive relief was inappropriate because Spencer had not established a pattern of discrimination by Wal-Mart and because Spencer would not benefit from an injunction (as she was no longer an employee of Wal-Mart). *Id.* at * 11-* 12. The Court also found that Spencer did not receive any benefit from litigation, because her back pay award had been vacated, and because her emotional distress award was offset by a prior settlement

agreement.[1] *Id.* at * 15. Thus, the District Court denied Spencer's request for attorney's fees. Spencer then filed a motion to alter and amend judgment and a motion for relief from judgment, arguing that it was appropriate for the jury to consider the back pay issue because back pay is not an equitable remedy. Spencer also contested the denial of attorney's fees. Spencer argued that the settlement agreement did not affect her status as a prevailing party because she signed the agreement after the jury rendered its decision.

The District Court upheld its ruling as to the back pay issue but reconsidered its decision on attorney's fees. Spencer v. Wal-Mart Stores, Inc., No. 03-104-KAJ, 2005 U.S. Dist. LEXIS 39038, at *3 *5 (D. Del. June 24, 2005). The Court agreed that the settlement agreement did not affect Spencer's status as the prevailing party because it was signed after trial. Id. at *5. The Court reasoned that the timing of the agreement was important because it indicated whether Spencer "had gone into the trial having already bargained

[1] Wal-Mart and Spencer reached an agreement to settle a worker's compensation action filed by Spencer with the Industrial Accident Board of Delaware. The settlement agreement includes a provision providing Wal-Mart with a "set-off/credit" for a portion of the recovery obtained in this litigation. The amount of the "set-off/credit" is $11,754.32. (S. App. 8.)

away her potential recovery." *Id.* The Court, however, found that Spencer had achieved limited success at trial, and thus, it reduced her lodestar[2] by 75% and awarded her $38,569.34 in attorney's fees. Id. at * 12.

Spencer appeals both orders of the District Court, arguing that the Court erred in vacating her back pay award and reducing her award of attorney's fees. Wal-Mart cross-appeals, arguing that Spencer is not the prevailing party and that she is not entitled to any attorney's fees. We first examine the parties' arguments as to the back pay award, and then we turn to their arguments as to the attorney's fees award.

II. Jurisdiction and Standard of Review

The District Court had subject matter jurisdiction under the ADA, 42 U.S.C. § 12101 et seq. We have appellate jurisdiction under 28 U.S.C. § 1291 (2000).

While we exercise plenary review over a district court's grant of judgment as a matter of law, Delli Santi v.

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[2] The "lodestar" is the amount of attorney's fees calculated by multiplying the reasonable number of hours spent on the case by a reasonable attorney's rate. Washington v. Phila. County Ct. Com. Pl., 89 F.3d 1031, 1035 (3d Cir. 1996). Here, the District Court indicated that the lodestar was $154,277.34. Spencer, 2005 U.S. Dist. LEXIS 39038, at *11. The parties do not contest this amount.

CNA Ins. Cos., 88 F.3d 192, 200 (3d Cir. 1996), we review an award of attorney's fees for abuse of discretion, E.E.O.C. v. L.B. Foster Co., 123 F.3d 746, 750 (3d Cir. 1997). "We must defer to the district court's fee determination unless it has erred legally, or the facts on which the determination rests are clearly erroneous." Quiroga v. Hasbro, Inc., 934 F.2d 497, 502 (3d Cir. 1991) (citation omitted).

III. Discussion

A. Back Pay

In this case, the District Court found that back pay was an equitable remedy reserved for the Court and that it had erred in presenting the issue to the jury. It then vacated the back pay award, noting that Spencer had not requested back pay from the Court. It further stated that even if Spencer had requested back pay, it would have denied the request because Spencer did not allege constructive discharge at trial. Spencer argues that the District Court should not have vacated the back pay award because it is not an equitable remedy but rather is a decision for the jury. We disagree with Spencer.

Back pay is available to a successful Title VII

plaintiff under the Civil Rights Act of 1964.[3] 42 U.S.C. § 2000e-5(g)(1); Landgraf v. USI Film Prods., 511 U.S. 244, 252 (1994). Specifically, the 1964 Act provided that a successful Title VII plaintiff can collect "reinstatement . . . , with or without back pay . . . , or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1) (emphasis added). Consistent with this language, we have treated back pay as a form of equitable relief awarded at the discretion of the court. *See* Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 85 (3d Cir. 1983) (stating that "back pay is itself considered a discretionary remedy"); Gurmankin v. Costanzo, 626 F.2d 1115, 1119, 1123 (3d Cir. 1980) (referring to the trial court's "exercise of discretion ... in granting or denying equitable relief' and stating that back pay is classified appropriately as an "equitable remedy"). Various of our sister Circuits are in agreement. *See* Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975) ("[T]he award of back pay is an integral part of the equitable remedy of reinstatement . . . ."); Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (same), overruled on other grounds by Griffin v. Dugger, 823 F.2d 1476 (11th Cir. 1987); Smith v. Hampton Training Sch. for Nurses, 360 F.2d

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[3] A plaintiff alleging employment discrimination under the ADA has the same remedies as provided by the 1964 Act. 42 U.S.C. § 12117(a).

577, 581 n.8 (4th Cir. 1966) (same).

The Civil Rights Act of 1991 expanded the recovery allowed under the 1964 Act and permitted compensatory damages. Landgraf, 511 U.S. at 252-53. Compensatory damages include "`future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.'" *Id.* at 253 (quoting 42 U.S.C. § 198 1 a(b)(3)). Under the 1991 Act, plaintiffs seeking compensatory damages may request jury trials. 42 U.S.C. § 1981 a(c)(1). The 1991 Act does not have a provision stating that parties seeking back pay may request a jury trial. *See Id.* § 1981 a(c). The 1991 Act further differentiates back pay from compensatory damages, stating that "[c]ompensatory damages ... shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." Id. § 1981 a(b)(2). The Supreme Court explained that "[this] new compensatory damages provision . . . is in addition to, and does not replace or duplicate, the backpay remedy allowed under prior law." Landgraf, 511 U.S. at 253 (quotation marks omitted).

The Supreme Court also stated that the 1991 Act "allows a plaintiff to recover in circumstances in which there

has been unlawful discrimination in the `terms, conditions, or privileges of employment' . . . even though the discrimination did not involve a discharge or a loss of pay." Id. at 254. Specifically, this "new right to monetary relief [was available to plaintiffs]. .. who were victims of a hostile work environment but were not constructively discharged.[4] *Id.* at 283. The 1991 Act thus "created a `major expansion in the relief available to victims of employment discrimination,' allowing the recovery of compensatory damages even where victims of the illegal employment practice had not suffered workplace discrimination sufficient to rise to the level necessary to constitute a constructive discharge." Mallinson-Montague v. Pocmick, 224 F.3d 1224, 1236 (10th Cir. 2000) (quoting Landgraf, 511 U.S. at 253-55)). The 1991 Act left "undisturbed the equitable remedies available under Title VII." Hertzberg v. SRAM Corp., 261

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[4] Constructive discharge occurs when an "employer knowingly permit[s] conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Goss v. Exxon Office Sys. Co., 747 F.2d 885, 887 (3d Cir. 1984).

A hostile work environment "will not always support a finding of constructive discharge." Marrero v. Goya of P.R., Inc., 304 F.3d 7, 28 (1st Cir. 2002). "To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment." Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992), aff'd, 511 U.S. 244.

F.3d 651, 659 (7th Cir. 2001). Given the statutory language, and the language in Landgraf distinguishing the former remedial structure allowing back pay from the new structure allowing compensatory damages, it is obvious that back pay remains an equitable remedy to be awarded within the discretion of the court.[5] Accord Lutz v. Glendale Union High Sch., 403 F.3d 1061, 1069 (9th Cir. 2005).

We hold that a successful hostile work environment claim alone, without a successful constructive discharge

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[5] Spencer has not made any valid arguments addressing this issue. She cites Bates v. Board of Education of the Capital School District, No. 97-394-SLR, 2000 U.S. Dist. LEXIS 13234 (D. Del. Aug. 29, 2000), to argue that "the amount of back pay ... damages is left to the jury." (Appellant's Br. 16-17 n.4.) In a prior opinion, however, the Bates court indicated that "back pay is intended as an equitable remedy." Bates v. Bd. of Education of the Capital Sch. Dist., No. 97-394-SLR, 2000 U.S. Dist. LEXIS 4873,*24-*25 (D. Del. Mar. 31, 2000) (citation omitted).

claim, is insufficient to support a back pay award.[6] Put simply, if a hostile work environment does not rise to the level where one is forced to abandon the job, loss of pay is not an issue. Here, the District Court vacated the jury's award of back pay, noting that it is an equitable remedy and that Spencer had not requested it from the Court. Spencer, 2005 U.S. Dist. LEXIS 4373, at *7. But, not only did Spencer fail to request back pay from the Court, she had also waived a claim for constructive discharge. (App. 74 n. 1.) She instead sought back pay based only upon her hostile work environment claim. This is insufficient to support a claim for back pay.

Accordingly, the District Court did not err in ruling that back pay is an equitable remedy and in vacating the jury's award of back pay.

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[6] Several of our sister Circuits have held similarly that a plaintiff alleging employment discrimination must show either actual or constructive discharge in order to receive an award of back pay. See Marrero, 304 F.3d at 28 (stating that the plaintiff must show constructive discharge in order to hold her employer responsible for the economic losses suffered); Hertzberg, 261 F.3d at 659 (holding that a plaintiff seeking back pay must show either actual or constructive discharge); Mallinson-Montague, 224 F.3d at 1236-37 (holding that the plaintiffs' claim for back pay failed because they did not allege constructive discharge); Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216, 1219 (8th Cir. 1997) (holding that, absent a showing of constructive discharge, plaintiffs alleging employment discrimination are not entitled to back pay).

B. Attorney's Fees

The District Court awarded Spencer attorney's fees after finding that she and Wal-Mart had reached a settlement agreement on her workers' compensation claims after the jury verdict, and that this did not affect her status as the prevailing party. The Court, however, found that Spencer had limited success at trial because: (1) she prevailed only on her emotional distress claim; (2) she did not benefit in any other tangible way from the litigation because she was not reinstated to her job but had agreed to resign; and (3) her actual award of $12,000 was far below her projected total damages of over $500,000. Spencer v. Wal-Mart Stores, Inc., 2005 U.S. Dist. LEXIS 39038, at * 12. Thus, the Court reduced the lodestar by 75% and granted Spencer $38,569.34 in attorney's fees. Id.

Both parties argue that the District Court erred in determining the attorney's fees award. Wal-Mart argues that Spencer is not entitled to any attorney's fees because she is not the prevailing party. Wal-Mart maintains this because the settlement agreement completely offset her emotional distress award[7] and thus deprived her of any benefit from her suit. Wal-

[7] It appears that the settlement agreement offset a large amount of Spencer's emotional distress award, but not the entire amount of the award. That is, $11,754.32 of the $12,000 award was offset by the settlement agreement. (J.A. 97; S. App. 8.)

Mart also argues, in the alternative, that if Spencer is the prevailing party, the Court was correct in reducing the lodestar. In contrast, Spencer argues that the Court erred in reducing the lodestar because her reasonable accommodation claim is interrelated with her successful hostile work environment claim. Spencer also argues that the Court erred in finding that she had achieved only limited success in her action because it improperly compared her recovery to her projected damages. Instead, she maintains, the Court should have compared her recovery to the claim for damages she eventually presented to the jury. We affirm the District Court's decision.

In an employment discrimination case, the district court has the discretion to award the prevailing party a reasonable attorney's fee. 42 U.S.C. § 2000e-5(k). The prevailing party can be either the plaintiff or the defendant. L.B. Foster Co., 123 F.3d at 750.[8] The former must

[8] In L.B. Foster, we noted that, even though attorney's fees may be awarded to an employer in a Title VII suit where it is the prevailing party, such awards should "be only sparingly awarded," because the employer, unlike the employee, is not acting as a private attorney general in the litigation. 123 F.3d at 750-51. It is merely defending against an action it had no role in bringing. The plaintiff, however, has brought an action which, if successful, advances the public interest of eliminating discrimination from the workplace. *Id.* at 750.

"`succeed on any significant issue in litigation which achieves some of the benefit. .. sought in bringing suit.'" Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)); Pub. Interest Research Group of N.J., Inc. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995).

Where a plaintiff has achieved only partial or limited success, a district court may adjust the fee downward. Hensley, 461 U.S. at 434-3 6; Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). It may do so "even where the plaintiffs claims were interrelated, nonfrivolous, and raised in good faith." Hensley, 461 U.S. at 436. Although a court may consider the amount of damages awarded compared to the amount of damages requested as one indication of a plaintiffs degree of success, it "may not diminish counsel fees [in a civil rights action] to maintain some ratio between the fees and the damages awarded." Washington, 89 F.3d at 1041.

Here, the District Court correctly held that Spencer was the prevailing party because she was successful on her hostile work environment claim. See Hensley, 461 U.S. at 433. Spencer's status as the prevailing party is not affected by the settlement agreement that offset her emotional distress

award. See Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414, 423-24 (3d Cir. 1993). In Gulfstream, we reasoned that the reduction of a plaintiffs net recovery due to the offset of a jury verdict by prior settlements does not indicate that plaintiff failed to prove any of its claims at trial. It may merely reflect plaintiff's skill as a negotiator with the other defendants, and the circumstance [under which] those negotiations occurred.

Id. Although Gulfstream was addressing whether a settlement agreement affected plaintiffs' success rate for purposes of determining the amount attorney's fees awarded under the Clayton Act, and the plaintiffs in Gulfstream had entered a settlement agreement before the jury rendered its verdict, the rationale there remains applicable here. Here, the jury held that Spencer was subjected to a hostile work environment and awarded her $12,000 for emotional distress. The District Court then affirmed this award. As in Gulfstream, the fact that Spencer chose to enter a settlement agreement, at whatever time, offsetting a large portion of her award does not mean that Spencer did not succeed on a significant issue in litigation, or that the jury or court had not granted Spencer some relief.

The District Court also correctly found that Spencer had achieved limited success in her action. As previously stated, the

Court supported its finding with three reasons: (1) Spencer prevailed only on her emotional distress claim; (2) Spencer did not benefit in any other tangible way from the litigation because she was not reinstated to her job but had agreed to resign; and (3) Spencer's actual award of $12,000 was far below her projected total damages of over $500,000. Spencer v. WalMart Stores, Inc., 2005 U.S. Dist. LEXIS 39038, at *12. The District Court has sufficiently supported its finding. Furthermore, it does not appear that the Court sought to maintain a ratio between Spencer's awarded damages and her fee. Accordingly, we hold that it did not abuse its broad discretion in reducing Spencer's attorney's fees by 75%.

IV. Conclusion

The District Court correctly ruled that back pay is an equitable remedy and correctly vacated the back pay award. Furthermore, the Court did not abuse its discretion in reducing Spencer's attorney's fees award after finding that she had limited success at trial. Accordingly, we will AFFIRM the District Court's orders vacating Spencer's award of back pay and awarding attorney's fees to Spencer.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

05-2143, 05-3436 & 05-3471

LILY SPENCER,
Plaintiff-Appellant/Cross Appellee
V.
WAL-MART STORES, INC., Defendant-Appellee/Cross Appellant

PRESENT: SCIRICA, Chief Judge, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, Circuit Judges
RESTANI*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT:
/s/ Theodore A. McKee
Circuit Judge

DATED: February 7, 2007

CH/cc: Nancy Abrams, Esq.
Alan B. Epstein, Esq.
Davis S. Fryman, Esq.

* Judge Jane A. Restani, United States Court of International Trade sat on the original panel and vote is limited to panel rehearing only.